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No. 05-908

Supreme Court, U.S.
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In The Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT, NO. 1, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. How are the Equal Protection rights of public high school students affected by the jurisprudence of *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003)?

2. Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools?

3. May a school district that is not racially segregated and that normally permits a student to attend any high school of her choosing deny a child admission to her chosen school solely because of her race in an effort to achieve a desired racial balance in particular schools, or does such racial balancing violate the Equal Protection Clause of the Fourteenth Amendment?

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AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioner. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in every state in the country.

MSLF has challenged several laws and government policies as violative of the Equal Protection Clause. Specifically, in the context of racial discrimination, MSLF has litigated cases implicating the Equal Protection Clause, such as *Wygant v. Jackson Board of Education*, 476 U.S.

[1] Counsel for Petitioner and Respondents filed universal consents with the Court for the filing of *amicus* briefs in support of either party. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

267 (1986), and *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

OPINIONS BELOW AND JURISDICTION

Amicus hereby adopts Petitioner's description of the opinions below, jurisdiction, and statement of the case. *See* Petition at 1-7.

SUMMARY OF THE ARGUMENT

Each time Seattle School District, No. 1 (the "District"), uses its racial tiebreaker to select one student and reject another on account of a student's race, the District engages in racial discrimination. Because the Equal Protection Clause of the Fourteenth Amendment was originally understood to absolutely prohibit the government from discriminating on the basis of race, this Court should reverse the decision of the Ninth Circuit.

Recently, however, this Court has strayed from the original understanding of the Equal Protection Clause and, instead, has permitted governments to engage in racial discrimination whenever there is a "compelling government interest" to do so. The District's racial tiebreaker, however, fails to meet the compelling government interest test. Because the racial discrimination engaged in by the District and permitted in *Grutter v. Bollinger*, 539 U.S. 306 (2003), is prohibited under the "strict scrutiny" standard, this Court should overrule *Grutter* and reverse the opinion of the Ninth Circuit.

ARGUMENT

The Ninth Circuit, in *Parents Involved in Community Schools v. Seattle School District, No. 1*, 426 F.3d 1162 (9th Cir. 2005) ("*Parents*"), relied heavily upon *Grutter*, in which this Court held that the Equal Protection Clause does not prohibit consideration of race to foster educational diversity in a public law school. *Grutter*, 539 U.S. at 343; U.S. Const. amend. XIV, § 1. The question before this Court is whether *Grutter* may be extrapolated to sanction state-imposed racial discrimination for the purpose of racial diversity in public high schools. A careful analysis of the text of the Equal Protection Clause and this Court's jurisprudence of that Clause reveals that state-implemented racial discrimination for the sake of racial diversity violates the Equal Protection Clause of the Fourteenth Amendment. As a result, this Court should reverse the decision of the Ninth Circuit and overturn this Court's ruling in *Grutter*.

I. THE TEXT OF THE EQUAL PROTECTION CLAUSE PROHIBITS THE DISTRICT FROM ENGAGING IN RACIAL DISCRIMINATION TO ACHIEVE RACIAL DIVERSITY.

A. Adherence To The Text Of The Constitution Is The Most Intrinsically Sound Method Of Constitutional Construction.

Interpreting the Constitution based on the original understanding of the text is the most intrinsically sound method of construction. *See, e.g., City of Boerne v. P.F. Flores*, 521 U.S. 507, 519 (1997) ("In assessing the breadth of § 5's [of the Fourteenth Amendment] enforcement power, we begin with its text."); *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 63

(1936) (finding no need to discuss the history of the Twenty-First Amendment, subsequent Court rulings interpreting the amendment, or statutes passed in reliance on the amendment because the language of the amendment is clear). As Justice Curtis explained, "When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is according to their own views of what it ought to mean." *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (Curtis, J., dissenting). Indeed, "the text of our Constitution is the best guide to its meaning." *Granholm v. Heald*, 544 U.S. 460, 516 (2005) (Thomas, J., dissenting).

When interpreting the Constitution, "[t]he words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). Specifically, "the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification." *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993) (Scalia, J., concurring); *see also South Carolina v. U.S.*, 199 U.S. 437, 448 (1905) ("The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.").[2] To discern

[2] As Justice Thomas explained, the purpose of this method of construction is threefold:

> First, it deprives modern judges of the opportunity to write their own preferences into the Constitution by tethering their analysis to the understanding of those who drafted and ratified the text. Second, it places the authority for creating legal

(Continued on following page)

the original understanding of the constitutional text, this Court must examine the contemporaneous understanding of the text, the historical perspective of the text, and the overall structure of the document.[3] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) (in praise of Chief Justice Taft's opinion in *Myers v. United States*, 272 U.S. 52 (1926)); *see also* David F. Forte, *The Originalist Perspective, in The Heritage Guide to the Constitution* 15-16 (Edwin Meese III *et al.* eds., 2005) (hereafter "*Originalist Perspective*").

B. The Text Of The Equal Protection Clause Absolutely Prohibits Racial Discrimination By Government Actors.

In holding that state-imposed racial discrimination is constitutionally permissible, the Ninth Circuit neglected to analyze the plain meaning of the text of the Equal Protection Clause. *See Parents*, 426 F.3d 1162. Moreover, in *Grutter*, the case primarily relied upon by the Ninth Circuit, this Court also failed to address the plain meaning of the text. Marvin H. Lett, *Grutter, Gratz and Affirmative*

> rules in the hands of the people and their representatives rather than in the hands of the nonelected, unaccountable federal judiciary. Thus, the Constitution means not what the Court says it means, but what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean. Third, it recognizes the basic principle of a written Constitution. We as a nation adopted a written Constitution precisely because it has a fixed meaning that does not change.

Clarence Thomas, *Judging*, 45 U. Kan. L. Rev. 1, 5 (1996).

[3] In fact, the Framers themselves applied similar interpretive methods. David F. Forte, *The Originalist Perspective, in The Heritage Guide to the Constitution* 15-16 (Edwin Meese III *et al.* eds., 2005).

Action: Why No 'Original' Thought?, 1 Stan. J. Civ. Rts. & Civ. Liberties 417, 420 (2005). As Justice Thomas wrote, the majority opinion in *Grutter* upheld racial discrimination "not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti." *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part).

Some have argued that the text of Section 1 of the Fourteenth Amendment is ambiguous. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2467 (1866) (Rep. Boyer); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 60 (Harvard University Press 1988, 1995). However, "the vagueness and ambiguity of section one's language and the failure of the framing generation to settle how it would apply to a variety of specific issues should not lead those who must interpret the Fourteenth Amendment to conclude that the section has no meaning." *Id.* at 61. Instead, much can be learned – including the constitutionality of state-mandated racial diversification – by carefully analyzing the text under the lens of Justice Scalia's aforementioned interpretive method.

1. Contemporaneous understanding of the Clause reveals that its prohibition is absolute.

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1.[4] "[A] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Grutter* at 342 (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). Clearly, the text includes no exceptions for compelling government interests. Indeed, there is no indication that its authors ever considered that certain extenuating circumstances might necessitate the need for an exception to the Clause. Instead, Rep. Bingham, the primary drafter of the Equal Protection Clause, believed in "absolute equality of all." Cong. Globe, 34th Cong., 3rd Sess. app. 140 (1857). He explained that the Equal Protection Clause should apply regardless of the circumstance. Cong. Globe, 39th Cong., 1st Sess. 1094 (1866). Furthermore, Senator Jacob Howard definitively explained to the Senate the undoubted meaning of the Equal Protection Clause.[5]

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[4] Though the Clause arguably protects people from all forms of discrimination, it is evident that, at a minimum, the Clause prohibits racial discrimination.

[5] Flack concluded:

> The declaration of Mr. Howard in explaining the first section of the Fourteenth Amendment could hardly have been stated more clearly and squarely, and there could be no doubt, it seems, as to its object and purpose. No one could reasonably say, after reading or hearing his speech, that he had been misled as to the purpose and effect of the Amendment. . . . [The Fourteenth Amendment's] purpose was clearly and fairly set forth by Mr. Howard and others. His interpretation of the Amendment was not questioned by any one, and in view of his statement made at the beginning of his speech, this interpretation must be accepted as that of the Committee, since no member of the Committee gave a different interpretation or questioned his statements in any particular.

Horace Edgar Flack, *The Adoption of the Fourteenth Amendment* 87 (1908, 1965) (hereafter "*Fourteenth Amendment*").

Flack, *Fourteenth Amendment* at 87. According to Howard, the Clause "establishes equality before the law." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

Whether other contemporaries interpreted the text as an absolute prohibition against racial discrimination is unclear. In the states' ratification debates, legislators rarely dissected the text of the Equal Protection Clause to discern a meaning beyond that which is conveyed by the words themselves.[6] *See, e.g.*, Flack, *Fourteenth Amendment*, at 168-172, 204, 208. Likewise, the press did not spend much time analyzing the Amendment's text, but, instead, primarily discussed the probability of its ratification. *Id.* at 146.

More recently, however, Justice Stewart, in his explanation of the manner in which the Equal Protection Clause had been interpreted, wrote that "history contains one clear lesson. Under our Constitution, the government may *never* act to the detriment of a person solely because of that person's race." *Fullilove v. Klutznick*, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting) (emphasis added). "Racial discrimination is by definition invidious discrimination," *id.*, and "[t]he equal protection standard of the Constitution has one clear and central meaning: it absolutely

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[6] The legislators of certain States, such as Vermont, Kansas, Maine, Nevada and Kentucky, spent precious little time discussing the amendment, and "[t]he first section [including the Equal Protection Clause], the most important of all, was largely lost sight of" by the state legislatures. Flack, *Fourteenth Amendment* at 168-172, 204, 208.

prohibits invidious discrimination by government." *Id.* at 523.

2. An historical analysis of the Clause demonstrates that its prohibition is absolute.

Although this Court has noted that the historical underpinnings of the Equal Protection Clause are inconclusive with regard to the issue of race in public schools, *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 489 (1954), the historical context in which the Fourteenth Amendment was ratified provides some insight into its interpretation.

The United States was "founded upon the doctrine of equality. . . ." *Adarand*, 515 U.S. at 227 (internal citations omitted). Expounding upon this notion, "James Madison expressed the prevailing sentiment of the founding generation" in his *Memorial and Remonstrance Against Religious Assessments*. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245, 256 (1997) (referencing James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) (*reproduced in* Appendix to *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 63-72 (1947))). According to Madison, a law should not subject some people to "peculiar burdens," or grant others "peculiar exemptions." Madison, *supra*, *in Everson*, 330 U.S. at 66. Thus, the law should treat every person equally, regardless of his race or ethnicity.

Following emancipation of the slaves and subsequent "black codes" limiting the rights of freed slaves in the South, the need for a federal law protecting the rights of

blacks became abundantly clear and caused Congress to enact the Civil Rights Act of 1866. *University of California Regents v. Bakke*, 438 U.S. 265, 390-391 (1978) (separate opinion of Marshall, J.). Section 2 of the Civil Rights Act of 1866 explicitly prohibited discrimination on the basis of prior condition of slavery, race, or color. 14 Stat. 27-30. The Act was written in absolute terms; only one circumstance was excluded from the Act, that is, discrimination against certain convicted criminals. *Id.* Pursuant to the canon of construction *expressio unius est exclusio alterius*, it must be inferred that no other circumstance justified discrimination.

However, the constitutional authority for such a bill was dubious, causing Congress to "retroactively ratify the 1866 Act" through the Fourteenth Amendment. Lawrence Schlam, *Equity in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. Ill. U. L. Rev. 425, 433 (2004). To be sure, many members of Congress, the press, and state legislators considered this the primary function of the Fourteenth Amendment. *See, e.g.*, Flack, *Fourteenth Amendment* at 153, 186; Cong. Globe, 39th Cong., 1st Sess. Appendix 133-134 (Rep. Rogers); Cong. Globe, 39th Cong. 1st Sess. 1034 (Rep. Bingham). Logically, the Fourteenth Amendment, which could be enforced by Congress pursuant to Section 5 of the Amendment, could only provide such constitutional authority for the Civil Rights Act if Section 1 of the Amendment itself provided equal or greater protections than did the statute. Therefore, the Fourteenth Amendment must, at a minimum, absolutely prohibit discrimination on the basis of race, color, or prior condition of servitude, with the only possible exception being in the instance of convicted criminals.

3. The overall structure of the Clause proves that its prohibition is absolute.

Section 1 of the Fourteenth Amendment, when read in its entirety, broadly protects individual liberties. The Privileges or Immunities Clause provides that a state may not pass a law that infringes on an individual's fundamental rights; pursuant to the Equal Protection Clause, every validly enacted state law must protect each individual equally; and the Due Process Clause mandates that, if a person violates a validly passed and equally enforced law, the state may not deprive him of his life, liberty, or property without the benefit of certain procedural rights. U.S. Const. amend. XIV, § 1. *See, e.g.*, Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* at 57 (concluding that Section 1 of the Fourteenth Amendment may have been designed to "guarantee that, in regard to fundamental personal rights, state law would be procedurally fair as well as substantively equal.") It is evident that Section 1 of the Fourteenth Amendment protects individual liberties in the broadest possible sense at every stage of state action. It may, therefore, be inferred that the Equal Protection Clause broadly and absolutely prohibits any discrimination on the basis of race.

This interpretation is buttressed further when the Fourteenth Amendment itself is read in context. The Fourteenth Amendment, along with the Thirteenth and Fifteenth Amendments, are known collectively as the Civil War Amendments because of the era in which they were passed and the subjects contained therein. The Thirteenth Amendment prohibited all slavery and indentured servitude; there were no circumstances that could justify slavery or indentured servitude. U.S. Const. amend. XIII. Likewise, the Fifteenth Amendment guaranteed the right

to vote irrespective of race, color, or previous condition of servitude; no circumstance could justify the denial of the right to vote on account of those factors. U.S. Const. amend. XV. Similarly, the Equal Protection Clause, when read in its proper structural context, broadly requires that states, in all circumstances, protect people equally.

4. The Equal Protection Clause absolutely prohibits the District's policy.

The original understanding of the Equal Protection Clause, as discerned through the contemporaneous understanding of the text, the historical analysis of the text, and the overall structure of the text, is that states absolutely may not apply state law unequally to any person on account of his race. Here, it is undisputed that certain white students are selected over certain nonwhite students, and vice versa, on account of the racial tiebreaker used by the District. Respondents' Brief in Opposition at 4-5. The Equal Protection Clause, as it was originally understood, absolutely prohibits this type of racial discrimination; no circumstance may constitutionally justify the unequal protection of the laws on account of an individual's race. Therefore, this Court should reverse the decision of the Ninth Circuit.

II. GOVERNMENT RACE-BASED DISCRIMINATION TO ACHIEVE "DIVERSITY" DOES NOT SATISFY THE COMPELLING GOVERNMENT INTEREST PRONG OF THE STRICT SCRUTINY TEST; THUS, THIS COURT MUST OVERRULE *GRUTTER* AND REVERSE THE NINTH CIRCUIT.

A. The District's Plan Fails The Strict Scrutiny Test.

Modern Equal Protection Clause jurisprudence provides another basis to reverse the Ninth Circuit and, in the process, overturn *Grutter*. In recent years, this Court has deviated from the original understanding of the Fourteenth Amendment. Under modern Equal Protection Clause jurisprudence, not all racial classifications unitized by government actors are inherently unconstitutional. Instead, the classifications must be analyzed by a reviewing court under "strict scrutiny." *Adarand*, 515 U.S. at 227.[7] This rigorous test is applied whenever the government discriminates on the basis of race because racial discrimination was the "central purpose" of the Fourteenth Amendment. *Id.* To satisfy this test, government-imposed racial discrimination must be "narrowly tailored to further compelling government interests." *Grutter*, 123 U.S. at 326; *see also Adarand*, 515 U.S. at 227. The burden is on the government to prove that its discrimination satisfies the strict scrutiny test. *Id.* at 224.

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[7] In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990), this Court applied a more lenient standard to determine the constitutionality of racial discrimination by the federal government. In overruling these decisions, this Court in *Adarand* adopted a more stringent "strict scrutiny" standard for both the state and federal governments. *Adarand*, 515 U.S. at 227.

Because it is impossible to determine which classifications are benign or remedial, this Court applies strict scrutiny to all racial classifications "'to smoke out' illegitimate uses of race by assuring that the [state] is pursuing a goal important enough to warrant use of a highly suspect tool." *Adarand*, 515 U.S. at 226 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). In so doing, the Court analyzes discrimination on a personal, rather than on a group basis. *Adarand*, 515 U.S. at 227. Therefore, all classifications that are based on an individual's race, including those used by the District, are, at a minimum, subject to strict scrutiny. Moreover, the District has the burden of proving that its admissions plan satisfies this test.

In upholding the District's admission plan, the Ninth Circuit, relying on this Court's ruling in *Grutter*, set forth four primary benefits of the District's plan. First, the Ninth Circuit concluded that racial diversity in public schools enhances students' critical thinking skills. *Parents*, 426 F.3d at 1174. Second, it determined that racial diversity improves socialization, citizenship, and cross-racial understanding. *Id.* at 1174-1175. Third, it concluded that racial diversity increases a student's interracial network of friends. *Id.* Finally, it held that racially concentrated schools tend to provide inferior education. *Id.* at 1177.

The Ninth Circuit's holding is fatally flawed, as is the decision of this Court in *Grutter,* first, because racial discrimination by government actors to achieve "diversity" is not a "governmental interest," and, second, because the injuries inflicted by race-based decision making by government actors to achieve "diversity," that is, the burdens imposed upon innocent citizens, in this case high school

students, overwhelm the putative and purported benefits of what is little more than state-sponsored racism and render the reputed reasons for that racism far from "compelling."

B. There Is No Government Interest In Race-Based Decision Making To Achieve Diversity.

To be considered a "government interest," there, logically, must be some legitimate basis underlying a government action. Yet, in the context of racial diversity, the alleged interest "is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classification." *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 612 (1990) (overruled by *Adarand*) (O'Connor, J., dissenting). Because the Ninth Circuit, and this Court in *Grutter*, relied upon these amorphous and insubstantial "interests," this Court should reverse the decision of the Ninth Circuit and overturn *Grutter*.

Justice Brandeis once declared that "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 468 (1928) (Brandeis, J., dissenting) (overruled on other grounds, *Katz v. U.S.*, 389 U.S. 347 (1967)). Historically, from the Declaration of Independence, through the Constitution, the Civil War Amendments, Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 37 (1896), *Brown*, the 1964 Civil Rights Act, *Croson*, and *Adarand*, the lesson taught by this Republic has been that, "[i]n the eyes of the government, we are just one race here. It is American." *Adarand*, 515 U.S. at 241 (Scalia, J., concurring). Thus, over the course of its history, this Nation has repudiated any "interest" in judging its

citizens based upon whatever racial classification may apply to them.

That is true regardless of "whatever federal, state, or local government actor" seeks to use "racial classifications," *Adarand*, 515 U.S. at 227, to "act to the detriment of a person solely because of that person's race," *Fullilove*, 448 U.S. at 525 (Stewart, J., dissenting), but it is most especially true with regard to state and local governments and has been true since this Court's ruling in *Brown*, and, if not *Brown*, then certainly *Croson*.

C. Race-Based Decisions By Government For The Sake Of Diversity Are Never Compelling.

The Ninth Circuit and this Court in *Grutter* ignored both the adverse impact of race-based decision making by government actors purportedly in pursuit of diversity and the conflict of such decision making with the essence of America's constitutional system of government. *Parents*, 426 F.3d at 1174-1179; *Grutter*, 539 U.S. at 327-333. Examining both demonstrates that state-sponsored racism to achieve diversity is not "compelling."

First, discrimination on the basis of race emphasizes racial differences amongst individuals, rather than similarities. Thus, while racial diversity in schools may help break down racial stereotypes, *Parents*, 426 F.3d at 1176; *Grutter*, 539 U.S. at 330, discrimination to achieve this end counteracts the alleged benefit. "The dangers of such classifications are clear. They endorse race-based reasoning and the conception of a Nation divided into racial blocks, thus contributing to an escalation of racial hostility and conflict." *Metro Broadcasting*, 497 U.S. at 603

(O'Connor, J., dissenting) (citing *Croson*, 488 U.S. at 493-494). Indeed, "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part).

Second, racial discrimination "provoke[s] resentment among those who believe that they have been wronged by the government's use of race." *Adarand*, 515 U.S. at 241 (Thomas, J., concurring). It makes no difference whether, on average, white students are denied admission on account of their race about as often as are nonwhite students; each individual student denied admission to a high school on account of his race – not to mention that student's parents and friends – will suffer resentment toward the "preferred" race. This undermines the alleged benefits of cross-racial understanding. *Parents*, 426 F.3d at 1175; *Grutter*, 539 U.S. at 330. Moreover, "[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law." *Adarand*, 515 U.S. at 240 (Thomas, J. concurring).

Third, an individual is demeaned when government actors presuppose his beliefs mirror those of a particular racial group stereotype. Thus, when the District seeks the "different viewpoints and experiences" that it assumes will result from selecting students on the basis of their race, *Parents*, 426 F.3d at 1174, it assumes that "members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens" and thereby "demean[s]" those students and does precisely what the Constitution prohibits. *Metro Broadcasting*, 497 U.S. at 602 (Kennedy, J., dissenting). Further, rather than giving students the opportunity to "understand and

challenge views which are different from their own," *Parents*, 426 F.3d. at 1174, "governmental use of 'race' as a label . . . compels citizens to think in terms of those labels and assign themselves and others into predetermined boxes." Jay P. Lechner, *Learning From Experience: Why Racial Diversity Cannot Be a Legally Compelling Interest In Elementary and Secondary Education*, 32 SW. U. L. Rev. 201, 229 (2003).

Fourth, although some students may benefit educationally from racial diversity, *Parents*, 426 F.3d at 1174; *Grutter*, 539 U.S. at 328-333, others may suffer as a direct result of it. *See id.* at 364-365 (Thomas, J., concurring in part and dissenting in part). Thus, government-imposed racial discrimination creates new challenges for those who learn better in a homogeneous learning environment.

Fifth, and finally, the District's racial discrimination undermines the very principles upon which the Nation was founded. "[T]he American revolution was fought over individual liberty, not democracy." Martin D. Carcieri, *Democracy and Education in the Thought of Jefferson and Madison*, 26 J.L. & Educ. 1, 6 (1997). Liberty was seen by John Adams, Thomas Jefferson, and James Madison as the end sought, while democratic institutions merely served as a necessary evil to protect that liberty. *Id.* at 6, 18. Nonetheless, the District justifies racial discrimination, a distinct infringement upon individual liberties, by arguing that the discrimination encourages students to think "democratically." *Parents*, 426 F.3d at 1175. Thus, the District's policy allegedly supports the means to protect liberty at the expense of liberty itself.

A compelling government interest exists "only [by] a social emergency rising to the level of imminent danger to

life and limb." *Croson*, 488 U.S. at 521 (Scalia, J., concurring). The Ninth Circuit's ruling in *Parents*, relying on *Grutter*, fails to meet that test.

D. *Grutter* Should Be Overruled.

1. Though this Court ought to defer to precedent, it must reject precedent when there is a special justification to do so.

"The doctrine of *stare decisis* is essential to the respect accorded to the judgments of this Court and to the stability of the law," *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (wherein the Court expressly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986)); however, that doctrine is "not an inexorable command, particularly when . . . interpreting the Constitution." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (expressly overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (abandoning a strict application of *stare decisis*). Instead, it is a mere "principle of policy." *Lawrence*, 539 U.S. at 577. Therefore, "[i]n prior cases, when this Court has confronted wrongly decided, unworkable precedent calling for some further action by the Court, [the Court has] chosen not to compound the original error, but to overrule the precedent." *Payne v. Tennessee*, 501 U.S. 808, 842-43 (1991) (Souter, J., concurring) (wherein the Court partially overruled *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)). This is particularly true when the precedent being overruled is not well established. *Adarand*, 515 U.S. at 233-34 (explaining that abandoning *stare decisis* has more severe ramifications when overruling well-established precedent that has engendered substantial

societal reliance); *United States v. Morrison*, 529 U.S. 598, 622 (2000) (concluding that the force of the doctrine of *stare decisis* stems, in part, from the length of the time the precedent has been on the books).

Reconsideration of earlier decisions is especially important in constitutional cases because in such cases "correction through legislative action is practically impossible." *Payne*, 501 U.S. at 828 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)). Ultimately, recent Equal Protection Clause jurisprudence should be overruled if there is a "special justification" for doing so. *Adarand*, 515 U.S. at 231 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

2. A special justification exists to overrule *Grutter*.

In *Grutter*, the Court concluded that a law school "has a compelling interest in attaining a diverse student body." *Grutter*, 539 U.S. at 328. However, in its compelling interest discussion, the Court ignored the original understanding of the Equal Protection Clause and its absolute bar against race-based decision making by governments, ignored the fundamental principles upon which this Nation was founded, prime among them a guarantee that "all men are created equal," and never analyzed the harm done when government actors engage in racial discrimination. Moreover, the decision ignored this Court's Equal Protection Clause jurisprudence, which is reflected in the holdings of this Court in *Brown*, *Croson*, and *Adarand*. Specifically, in *Adarand* this Court noted that, in ruling in *Metro*, this Court departed from that jurisprudence.

Adarand, 515 U.S. at 219-227. *Grutter* represents a similar departure and must be overturned.

CONCLUSION

This Court should reverse the decision of the Ninth Circuit and overturn *Grutter*.

Respectfully submitted:

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